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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 PHILADELPHIA INDEMNITY)
12 INSURANCE COMPANY,)
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14 v. Plaintiff,)
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16 DOUGLAS E. BARNHART, INC.,)
17 Defendant.)
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Civil No. 06cv0717 J (JMA)

**ORDER GRANTING
DEFENDANT'S MOTION TO
CONSOLIDATE FOR PURPOSES
OF DISCOVERY ONLY.**

AND ALL RELATED ACTIONS.

Before the Court is Douglas E. Barnhart, Inc.'s ("Defendant") Motion to Consolidate Case No. 06cv0717 with Case No. 07cv0388 for purposes of discovery only. [Doc. No. 37.] The Court determined that the issues presented were appropriate for decision without oral argument pursuant to Civil Local Rule 7.1.d.1. For the reasons stated below, the Court **GRANTS** Defendant's Motion to Consolidate for purposes of discovery only.

Background

This dispute arises from an insurance agreement ("Policy") that Plaintiff Philadelphia Indemnity Insurance Company ("Plaintiff") issued to Defendant. (See Pl.'s Compl. at 2, 4;

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1 Def.'s Answer at 2.) Vista Unified School District ("Vista Unified") was the named insured on
2 the Policy. (See Pl.'s Compl. at 2.) In 2003, Defendant entered into a contract with Vista
3 Unified to construct the Guajome Park Academy ("Project"), a four building charter school.
4 (*Id.*; Def.'s Answer at 1; Def.'s Countercl. at 2; Pl.'s Answer to Def.'s Countercl. at 2.) As the
5 general contractor for the Project, Defendant was also covered by the policy. (See Pl.'s Compl.
6 at 2; Def.'s Answer at 2; Def.'s Countercl. at 2.) Defendant subcontracted with Artimex to
7 perform steel fabrication for the Project. (See Def.'s Countercl. at 2.) As a subcontractor,
8 Artimex was also covered by the policy. (See Pl.'s Compl. at 2; Def.'s Answer at 2; Def.'s
9 Countercl. at 2.)

10 Vista Unified hired Testing Engineers, Inc. ("Testing Engineers") to inspect and approve
11 the steel fabrication completed by Artimex. (See Pl.'s Compl. at 2; Def.'s Answer at 2.) Testing
12 Engineers inspected all shop and field work completed by Artimex. (See Pl.'s Compl. at 2;
13 Def.'s Answer at 8.) After substantial work was completed on the project, Vista Unified
14 discovered that one of Testing Engineers' inspectors was unqualified, (See Pl.'s Compl. at 2),
15 and, as a result, fired Testing Engineers. (See Def.'s Countercl. at 2.) Upon firing Testing
16 Engineers, Vista Unified hired a third party inspection company to reinspect all of the previously
17 approved welds on the Project. (See Def.'s Countercl. at 2; Def.'s Answer at 2.)

18 Plaintiff claims that after the third party inspection company reinspected the welds, Vista
19 Unified demanded that the welds be replaced. (See Pl.'s Compl. at 2, Def.'s Answer at 2.)
20 Defendant denies knowledge of whether the third party inspection company actually reinspected
21 the welds but admits that it was ordered by Vista Unified to deconstruct and reconstruct certain
22 work on the Project. (See Def.'s Answer at 2.) Defendant alleges that many of the welds that
23 Testing Engineers had inspected were inadequate and required additional welding work, which
24 delayed and interrupted the project, and required Defendant to spend additional time, materials,
25 and resources. (See Def.'s Countercl. at 3.)

26 In March of 2005, Defendant submitted a claim to Keenan & Associates, the

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1 administrator of Vista Unified's school insurance program. (*See* Pl.'s Compl. at 2; Def.'s
 2 Answer at 2.) On July 26, 2005, Plaintiff received a claim by Defendant for reimbursement for
 3 the above-described damages under the policy. (*See* Def.'s Countercl. at 3; Pl.'s Answer to
 4 Def.'s Countercl. at 2.) Plaintiff denied the claim. (*See* Pl.'s Answer to Def.'s Countercl. at 2.)
 5 Def.'s Countercl. at 3.)

6 On April 4, 2006, Plaintiff filed a Complaint in this Court seeking a judicial declaration
 7 that Defendant has no lawful claim against Plaintiff for insurance coverage due to the delay
 8 caused by the defective welds. (*See* Pl.'s Compl. at 2, 4.) Defendant filed a Counterclaim and
 9 an Answer. [Doc. Nos. 4, 5.] In Defendant's Counterclaim, it alleges: (1) breach of insurance
 10 contract for denying Defendant's insurance benefits under the policy and (2) breach of implied
 11 covenant of good faith and fair dealings because Plaintiff failed to timely investigate
 12 Defendant's insurance claim. (*See* Def.'s Countercl. at 3-4.) On July 26, 2007, Plaintiff filed an
 13 Answer to Defendant's Counterclaim. [Doc. No. 7.]

14 On July 18, 2007, Defendant filed this Motion to Consolidate the initial claim and
 15 Defendant's counterclaim for purposes of discovery. [Doc. No. 37.] On August 6, 2007,
 16 Defendant submitted a Notice of No Opposition Filed to the Court ("Notice"), stating that, as of
 17 the date of the Notice, the Plaintiff had filed no opposition to the consolidation of the cases.
 18 [Doc. No. 41.]

19 *Legal Standard*

20 Federal Rule of Civil Procedure 42(a) provides in pertinent part that "[w]hen actions
 21 involving a common question of law or fact are pending before the court...it *may* order all
 22 actions consolidated; and it may make such orders concerning proceedings as may tend to avoid
 23 unnecessary costs or delay." Fed. R. Civ. P. 42(a) (emphasis added). When related cases fall

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1 within the parameters of Rule 42, it is within the district court's sound discretion to consolidate
 2 them. *See Investors Research Co. v. U.S. Dist. Ct.*, 877 F.2d 777, 777 (9th Cir. 1989). Rule 42
 3 does not demand that actions be identical before they may be consolidated. Rather, in deciding
 4 whether to consolidate actions under Rule 42(a), a court must balance the savings of time and
 5 effort consolidation will produce against any inconvenience, delay, confusion, or prejudice that
 6 may result." *Takeda v. Turbodyne Technologies, Inc.*, 67 F. Supp. 2d 1129, 1132 (C.D. Cal.
 7 1999).

8 *Discussion*

9 After reviewing the complaints in the two related cases, the Court **FINDS** that they
 10 involve common questions of fact and law. As the Defendant points out, both cases concern the
 11 same damages that the Defendant alleges it incurred as a result of the deconstruction and
 12 reconstruction of portions of the Project. (Mot. at 4.) More specifically, the results of both cases
 13 will depend on the Court's finding with regards to the following common questions of fact and
 14 law: (1) the work the Defendant performed to undo and redo work on the Project; (2)
 15 Defendant's extended general conditions; (3) work performed by Defendant's lower tiers to
 16 undo and redo work on the Project; and (4) the lower tiers' extended general conditions. (Mot.
 17 at 5.) Any discovery pertaining to these four areas can be carried out with the purpose of
 18 obtaining information for both cases with few, if any, substantive changes.

19 Additionally, consolidating the two cases does not result in prejudice to the non-moving
 20 party. As of the date of Defendant's Motion, none of the parties had taken any depositions.
 21 (Mot. at 6.) Thus, consolidating the cases for purposes of discovery will not effect any previous
 22 depositions. Further, opposing party does not oppose consolidation or assert that consolidation
 23 will produce

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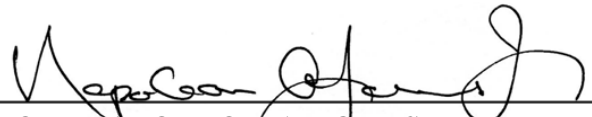
1 inconvenience, delay, confusion or prejudice. For these reasons, the Court finds that
2 consolidation of the above-referenced cases is appropriate.

3 ***Conclusion***

4 Accordingly, the Court **GRANTS** Defendant's Motion to Consolidate Case nos.
5 06cv0717 (JMA) and 07cv0388 (NLS) pursuant to Rule 42(a). The parties are directed to
6 contact the magistrate judge to set dates for trial and pre-discovery matters in the newly
7 consolidated case.

8 **IT IS SO ORDERED.**

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11 DATED: September 27, 2007

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13 HON. NAPOLEON A. JONES, JR.
14 United States District Judge

15 cc: Magistrate Judge Adler
16 All Counsel of Record
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